Office - Supreme Court, U. S.
FILED
MAR 5 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1014

EDDIE J. VIATOR,

Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdiction	3
Questions presented	3
Reasons relied on for allowance of the writ	4
Prayer for writ	5
Brief in support of petition for writ of certiorari	7
I. The opinions of the Court below	7
II. Jurisdiction	7
III. Statement of the case, introductory	10
IV. Statement of facts	12
V. Specification of errors to be argued	14
VI. Brief of argument	16
VII. Argument and authorities	17
A. Conflict with Prior State and Federal Court Decisions. Points 1, 2, 3, 4, 5, 6, 7, 8, 9, 10	17
(1) The motion to dismiss admits the allegations of fact contained in the sworn bill of complaint	17
(2) Unless plaintiff has an adequate remedy at law, the District Court had jurisdiction to restrain the collection of the taxes mentioned in the sworn bill of complaint filed therein	18
(3) Unless the remedy afforded at law in the Courts of the State of Mississippi is plain, speedy and efficient, plaintiff has no adequate remedy at law	23
(4) Unless interest can be collected on the taxes assessed against plaintiff, he does not have an adequate remedy at law in the Courts of Mississippi	23

Page

(5) The Legislature of Mississippi alone can appropriate money to pay taxes unlawfully collected and the interest on said taxes..... 23

(6) No interest can be collected in the Courts of Mississippi on taxes erroneously paid or unlawfully collected without statutory authority..... 24

(7) Where a state statute provides that interest may be recovered without stipulating the rate of interest, no interest can be collected..... 25

(8) For estoppal of judgment to apply, or a judgment to be res judicata, the merits of the cause must be inquired into and decided..... 25

(9) The doctrine of the law of the case only applies where the facts are identical, the cause is between the same parties, full opportunity is afforded litigants to develop their case, and judgment is rendered on the merits of the cause..... 32

(10) Where the Supreme Court of the United States declines jurisdiction and dismisses an appeal for want of jurisdiction, or fails to grant certiorari, no right is lost by litigants to proceed further in state or federal courts..... 33

B. The Circuit Court of Appeals for the Fifth Circuit erred in affirming the action of the District Court and holding that petitioner's remedy was to pay the state tax and sue in the District Court of the United States for its recovery..... 35

(1) Conflict with the 11th Amendment to the Constitution of the United States and Decisions of the Supreme Court of the United States..... 35

Page

(2) Conflict with decisions of other Circuit Courts of Appeals 36
Conclusion 38

TABLE OF CASES CITED

Adams County v. *Northern Pac. Ry. Co.*, 115 F. (2d) 768 37
Atchison T. & S. R. Co. v. *United States*, 295 U. S. 193, 201, 202 31
Atlantic C. L. R. Co. v. *Doughton*, 262 U. S. 413 10,22,23
Australian Knitting Co. v. *Gormly*, 138 F. 92 26
Bohler v. *Callaway*, 267 U. S. 479 29
Boyd v. *State of Alabama*, 94 U. S. 645 29
Brooklyn Heights R. Co. v. *Straus*, 245 F. 132 27
Brown v. *Fletcher*, 182 F. 963, 105 C. C. A. 425 (Cert. den. 220 U. S. 611) 27
Cary v. *Corporation Commission of Okla.*, 9 F. Supp. 709, 296 U. S. 452 18,19
Chicago, etc., R. Co. v. *Railroad, etc., Commission*, 280 F. 387 33
Chicago Junction case, 264 U. S. 258 31
City of Indianola v. *Cates*, 181 Miss. 145 24
Colbert v. *State*, 86 Miss. 769 23
Corporation Commission of Oklahoma v. *Cary*, 296 U. S. 452, 56 Sup. Ct. 300 20,21
Coulson v. *Harris*, 43 Miss. 752 19
Davis v. *Wakelee*, 156 U. S. 680 23
Davis v. *Wallace*, 257 U. S. 478, 482 10,22
Dawson v. *Kentucky Distilleries*, 255 U. S. 286 23
Dennison v. *United States*, 168 U. S. 241 29
Florida E. C. R. Co. v. *United Sttaes*, 234 U. S. 167 31
Ford Motor Co. v. *Department of Treasury, etc.*, 65 Sup. Ct. 350–1 35
Fourniquet v. *Perkins*, 7 How. 160, 12 L. Ed. 650 27
G. & C. Merriam Co. v. *Saalfield*, 241 U. S. 22 25
Gramling v. *Maxwell*, 52 F. (2d) 260 21,36
Green v. *L. & I. R. Co.*, 244 U. S. 799 10,22
Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293 19,28
Gould v. *Evansville, etc. R. Co.*, 91 U. S. 526 26

Page

Gulf M. & O. R. Co. v. *Webster County*, 18 So. (2d) 644. 19,24
Hickey v. *Stewart*, 2 How. 750 25
House v. *Mayo*, 65 Sup. Ct. 521 34
Hughes v. *U. S.*, 4 Wall. 232, 18 L. Ed. 303 26,27
Hurst v. *Everett*, 21 F. 218 26
I. C. C. v. *Louisville & N. R. R. Co.*, 227 U. S. 88 31
Leung Jun v. *U. S.*, 171 F. 413, 96 C. C. A. 369 27
Lehigh Valley R. Co. v. *United States*, 243 U. S. 412 ... 31
Matthews v. *Rogers*, 284 U. S. 528 18
McGourkey v. *Toledo, etc., R. Co.*, 146 U. S. 536 25
Mississippi Power Co. v. *City of Aberdeen*, 9 F. Supp. 564 18,21
Moore v. *Tunica County*, 143 Miss. 839 19,24
Morgan v. *United States*, 304 U. S. 1, 21, 22 30
Nichols v. *Cleveland*, 247 F. 731, 159 C. C. A. 589, (Cert. den. 246 U. S. 668) 26
Nutt v. *Ellerbee*, 56 F. (2d) 1058, 1062 22,23,36
O'Brien v. *Wheelock*, 78 F. 672 26
Okla. Utility Co. v. *City of Harmoney*, 2 F. Supp. 849 .. 17
Okla. National Gas Co. v. *Russell*, 261 U. S. 290 32
Peoria & P. U. R. Co. v. *United States*, 263 U. S. 528 .. 31
Phipp v. *School District of Pittsburg*, 111 F. (2d) 392, 393 18,21,32,36
Piedmont & N. Ry. Co. v. *Query*, 56 F. (2d) 173 26
Printers and Publishers Corp. v. *Cochett*, 25 F. Supp. 369 18
Richardson v. *City of Boston, 60 U. S. 263* 29
Richardson v. *Scott*, 47 Miss. 236 19
Southern Ry. Co. v. *Query, et al.*, 21 F. (2d) 333 .. 17,18,23,37
Spencer v. *Watkins*, 94 C. C. A. 659 (Cert. den. 215 U. S. 605) 26
Southern Ry. Co. v. *Watts*, 260 U. S. 519 10
State v. *Cole*, 81 Miss. 174 23
Union Pac. R. Co. v. *Board of Commissioners of Weld County*, 247 U. S. 282 23
United States v. *Abilene & So. Ry.*, 265 U. S. 274 30
United States v. *Ash Sheep Co.*, 250 F. 572, 162 C. C. A. 588, (Cert. den. 248 U. S. 561) 27
Viator v. *State Tax Commission of Mississippi*, 195 Miss. 266, 5 So. (2d) 487, 488 28,29,31

Page

Warmsprings Irr. Dist. v. *May*, 117 F. (2d) 802..... 37
Magnum Import Co. v. *Coty*, 262 U. S. 159..... 10
West Ohio Gas Co. v. *Public Utilities Comm. of Ohio*, 294 U. S. 63..... 30
Whitaker v. *Branson*, 29 F. Cas. No. 17,526, 2 Paine 209..... 26

STATUTES CITED

Constitution of the United States, 11th Amendment... 16
Constitution of the United States, 14th Amendment...8,9,17
Constitution of Mississippi, Section 14.....8,9,16
Judicial Code, Section 266..... 10,18
Laws of Mississippi of 1938:
Chapter 113, Section 6..... 12
Chapter 150, Section 1..... 12,13
Mississippi Code of 1930:
Sections 72 & 73..... 13,30
Section 3276 as amended by Chapter 260, Laws of 1938..... 23
Mississippi Code of 1942:
Section 4292..... 23
Mississippi Constitution of 1890:
Section 63..... 23
Section 64..... 23
Section 69..... 23

ENCYCLOPEDIAS OF LAW

34 Corpus Juris:
Section 1186, pages 770–1..... 25
Section 1193, pages 774–5..... 26
Section 1194, pages 775, et. seq..... 27
Section 1194, pages 776–7..... 27
Section 1339, pages 935–6..... 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1014

EDDIE J. VIATOR,

vs. *Petitioner,*

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Petition of Eddie J. Viator respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

There is involved in this cause the right of petitioner, taxpayer, to enjoin the action of state officers, and the enforcement of state statutes, in the Federal court under Section 266 of the Judicial Code, as amended, on the ground of the unconstitutionality of such statutes and the unconstitutionality of such orders of administrative officers of the state, because the orders and judgments complained of herein were made and rendered without reasonable notice and hearing, and because petitioner, taxpayer, does

not have a plain, speedy and efficient remedy at law or in equity in the courts of the State; because the statutes of the state, as construed and applied against petitioner, are unconstitutional and violate the 14th Amendment to the Constitution of the United States and Section Fourteen of the Constitution of the State of Mississippi. As shown by sworn bill of complaint filed herein, admitted by Motion to Dismiss, the orders made against petitioner by state administrative officers were made and rendered without jurisdiction, without evidence, contrary to the indisputable character of the evidence offered by petitioner, contrary to the reasons given in Registered Demand for additional sales tax, without full investigation of the facts required by state statute, without opportunity to know the state of case against him, and without an adequate and fair hearing. The duty imposed upon state officers by state statutes, to investigate the matter fully before proceeding further, and to render a report in writing setting forth a review of the case and the essential facts of the matter, was contravened, ignored and violated, and state officers said they would not investigate the matter fully or at all, and would make no report in writing setting forth a review of the cause and the essential facts of the matter. State statutes do not permit an appeal, deny injunctive relief, and the state court held it could not and would not consider the evidence or lack of evidence on certiorari to review the Orders of the Administrative tribunal. State statutes do not permit recovery of interest on sales tax paid the State of Mississippi. Petitioner, taxpayer, does not have the money to pay the tax, and cannot, therefore, file suit to recover such taxes. If the orders and judgments made and rendered against him are enforced, his business and property sold, petitioner will suffer irreparable injury and damage. No independent investigation of the law and the facts of the case may

be had in the State court on certiorari. State statutes deny injunctive relief and the state court denied injunctive relief. The District Court sustained Motion to Dismiss and held that petitioner had an adequate remedy in the state court. The Circuit Court of Appeals for the Fifth Circuit held that the District Court erroneously sustained the Motion to Dismiss for the reasons stated, but held that petitioner could pay the tax and sue in the District Court of the United States for its recovery, and said that such was an adequate remedy.

B

Jurisdiction

Judicial Code, Section 240, amended; Title 28, U.S.C.A. 347(a) as amended by the Act of February 13, 1925, 43 Stats. 938.

C

The Questions Presented

Whether petitioner is entitled to enjoin the collection of unconstitutional taxes and the action of state officers proceeding in an arbitrary and unconstitutional manner, where taxpayer's only remedy in the state court is to pay said state taxes and file suit for their recovery where he alleges by sworn bill of complaint, admitted by Motion to Dismiss, that he cannot pay said taxes, because he does not have the money, state statutes do not allow recovery of interest on sales tax paid the State of Mississippi, the rate is not fixed by statute, and the State Supreme Court holds that interest on taxes paid the state cannot be recovered where the rate is not fixed by statute. The further question is presented, whether taxpayer may be denied the right to an independent investigation of the law and the facts in the state courts, and without such right, required to pay such state taxes

and await such time as it will take to sell his business and his property and then be required to file suit in the state court to recover said taxes, without interest.

Whether, notwithstanding the allegations of sworn Bill of Complaint, Motion to Dismiss should have been sustained for the reasons shown by the District Court, or taxpayer required to pay the tax and sue in the Federal Court for recovery, as held by the Circuit Court of Appeals for the Fifth Circuit.

May petitioner's challenge of the orders and judgments made against him, and his attack upon the constitutionality of state statutes, as violative of the Fourteenth Amendment to the Constitution of the United States and Section Fourteen of the Constitution of Mississippi, notwithstanding his asserted claim of federal right is denied, where his sworn Bill of Complaint shows and the Motion to Dismiss admits, that respondents failed to satisfy the requirements of state statutes, proceeded against petitioner contrary to the requirements of state statutes, and said they would not investigate the matter fully or at all, and would not make a report in writing setting forth a review of the cause and the essential facts of the matter, as required by state statutes.

D

Reasons Relied On for Allowance of the Writ

The decisions of the lower courts are contrary to the weight of authority of other Circuit Courts of Appeals of the United States.

(a) Other Circuit Courts of Appeals hold that unless taxpayer can recover interest on taxes in the state courts, he does not have an adequate remedy in the courts of the state.

(b) Other Circuit Courts of Appeals hold that if taxpayer is unable to pay state taxes, because he does not have the money, he is entitled to enjoin the action of state officers in the federal courts.

(c) Other Circuit Courts of Appeals hold that taxpayer is not required to speculate with doubtful state court remedies; that where the remedy in the state court is not definite and certain, he is entitled to enjoin administrative officers in the federal courts.

The decisions of the lower courts are contrary to the decisions of the Supreme Court of the United States.

The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals of the United States on the same matter.

The decisions of the lower courts are contrary to the decisions of the courts of Mississippi.

An important question is involved in this case which it is in the public interest to have settled by the Supreme Court of the United States as the Court of last resort.

E

Prayer for Writ

Wherefore, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to, and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket #11,127, Eddie J. Viator, Appellant, versus A. H. Stone,

Chairman, State Tax Commission of Mississippi, et al., appellees, and that the judgment and decree of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem meet and just; and your petitioner will ever pray.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Petitioner.